IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16262 of 2006
With
SPECIAL CIVIL APPLICATION No. 16263 of 2006
With
SPECIAL CIVIL APPLICATION No. 16264 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES ; 3 to 5 NO**

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THAVRAJI MANJIBHAI TAVIYAD & 2-Petitioner(s)
Versus
STATE OF GUJARAT & 4-Respondent(s)

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Appearance :
MR RS SANJANWALA for Petitioner(s) : 1 – 3. MS SS SANJANWALA for Petitioner(s) : 1 - 3.
MR KP RAWAL ASSTT GOVERNMENT PLEADER for Respondents

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 01/09/2006

C.A.V. JUDGMENT

1. All the three petitioners, one armed police head constable and two armed police constables dismissed from service by the impugned order dated 24.3.2005, have approached this Court under Article 226 of the Constitution with the prayers to set aside the order of dismissal and the order made in the appeal preferred therefrom, with other consequential reliefs. According to the impugned order dated 24.3.2005, the petitioners were charged with the misconduct and offence of allowing the detainee in their custody to escape. Pursuant to the criminal case registered against them for the offences punishable under sections 224 and 225 of the Indian Penal Code, 1860, they were convicted of the offences by the criminal court. The misconduct alleged against the petitioners were also held to have been proved in the departmental enquiry held against them. However, the Additional Police Commissioner, Ahmedabad, by the impugned order, dismissed the petitioners in exercise of the powers conferred by Rule 5 of the Bombay Police (Punishment and Appeals) Rules, 1956 with the aid of proviso to sub-clause (2) of Article 311 of the Constitution. The petitioners preferred departmental appeals from the order of dismissal, taking as one of the grounds the

pendency of their appeals from conviction by the criminal court; but those appeals were also dismissed by the order dated 12.8.2005. By the judgment dated 26.9.2005, the Principal Sessions Judge allowed the appeals of the petitioners and set aside the punishment acquitting the petitioners. That judgment in appeal was based on the finding that the offences were alleged to have been committed by the petitioners while acting or purporting to act in the discharge of their official duty, but the previous sanction required under the provisions of Section 197 of the Code of Criminal Procedure, 1973 was not obtained. Otherwise, it was recorded in paragraph 11 of the judgment that the petitioners were certainly negligent in the discharge of their duty in view of the fact that, despite they being three in number, the lone accused had escaped from their custody. However, it was held to have not been proved that the petitioners had abetted his escape. It may be pertinent to note here that the sum and substance of the charge contained in the chargesheets dated 7.4.2003 issued to the petitioners was also that they had been extremely negligent in the discharge of their duty.

1.1 Thereafter, the petitioners have also exhausted the remedy of preferring revision applications which have also been dismissed by

the orders dated 7.7.2006 on the grounds that the Sessions Court had confirmed the finding of negligence in the discharge of duty and the charge was also established during the departmental enquiry.

2. Against the above backdrop of facts, it was vehemently argued by Mr. Sanjanwala, learned counsel for the petitioners, that the extreme penalty of dismissal from service could not be imposed solely on the basis of conviction of a civil servant in a criminal case and, particularly after acquittal being recorded by the higher forum, the delinquent was at least entitled to hearing in respect of the punishment and the proportion thereof. He submitted that, after the substratum of conviction being removed by the acquittal, dismissal could rest only on the departmental proceedings which were, in the facts of the present case, not fully completed and the petitioners were never heard in respect of the findings of enquiry and the punishment to be imposed. He also submitted that the charge of negligence was not proved against the petitioners in all its details and the accused in their custody could have escaped despite exercise of due care expected of a reasonable and prudent person. He also submitted that the fugitive was in any case caught again within a few days. He

relied upon the judgments of the Supreme Court in ***Manni Lal v. Parmai Lal [AIR 1971 SC 330]*** *and* ***Chaudhry Ram and Others v. State of Haryana [1994 Supp. (3) SCC 674]*** to submit that setting aside of the conviction and sentence in appeal has the effect of wiping out retrospectively the disqualification; and that once acquittal was on merit, delinquent would be entitled to reinstatement. Both the judgments are on different set of facts and the ratio thereof is not applicable in the different set of circumstances in the present cases.

3. There is no dispute about the fact that the order of conviction of the petitioners by the criminal court was operative at the time of dismissal of the petitioners and its legality could not have been challenged at that time. The subsequent event of acquittal of the petitioners by the appellate court could have removed the substratum of the order of dismissal if the acquittal were on merits. However, the acquittal of the petitioners, in the facts of the present case, is admittedly not on merits. On the contrary, the criminal court had once recorded the finding of guilt against the petitioners after appreciation of evidence and applying the standard of proof-beyond-reasonable-doubt and the appellate court has not disturbed that finding.

No legal provision or precedent was cited to support the submission that, in such circumstances, no sooner the order of conviction was reversed, the order of dismissal also has to be reversed. It was only submitted that the employer, in such circumstances, was entitled to re-start or complete the departmental proceedings and pass appropriate orders in accordance with law. However, that required reinstatement of the petitioners first and then departmental proceedings, according to the submission.

4. This court has, recently in Special Civil Application No.16280 of 2006, taken, as under, the view in this regard:

> ***"6.*** *To regard the order of acquittal by the appellate court as proof of innocence of the petitioner would amount to appreciating the form; leaving well alone the substance of the matter. The moot question is: whether the decision and action of the respondent under Regulation 40-C, which was valid at the time it was taken, got automatically vitiated on acquittal of the delinquent? The basis of the impugned order could be consideration of the circumstances of the case and inexpediency of following the normal procedure in view of conviction on the ground of conduct of the delinquent. Conviction by a criminal court means charges were proved beyond reasonable doubt. Going by the substance of the matter, that did not change on account of acquittal of the delinquent on technical grounds or otherwise than on merits by a higher forum. The proof of guilt beyond reasonable doubt remained on record and its appreciation by an independent judicial forum is also not disturbed by the higher forum. Then to hold a departmental enquiry for the same charges after acquittal and after formally*

reinstating the delinquent for that purpose after so many years could only be more inexpedient. Therefore, in such cases where the delinquent is convicted of offences for which employer could also have taken disciplinary action, the proper course for the delinquent may be to make an appeal to the employer to review the order of punishment, if there were grounds for some relief; but it may not be just and appropriate for this court, in exercise of its extraordinary jurisdiction, to strike down the order of termination of service only on the ground of reversal of the order of conviction on technical grounds. The extraordinary writ jurisdiction of the court could be exercised to do justice and not to undo it. As Earl Warren observed: "It is the spirit and not the form of law that keeps justice alive."

5. In the facts of the present case, not only that the departmental appeals of the petitioners are dismissed, but the revision applications made after acquittal are also dismissed after considering the circumstances and contentions of the petitioners and applying mind to the facts that the petitioners were acquitted but the charge of gross negligence was proved in both the proceedings. As observed by the Supreme Court in ***Om Kumar and Others v. Union of India [(2001) 2 SCC 386]***, the question of quantum of punishment in disciplinary matters is primarily for the disciplinary authority to decide and the jurisdiction of the High Court under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well-known principles known as *Wednesbury principles.* The

narrow scope of the jurisdiction and the applicability of the principle of "proportionality" in administrative law is exhaustively considered in ***Union of India v. Ganayutham [(1997) 7 SCC 463]*** where the primary role of the administrator and the secondary role of the courts in matters not involving fundamental freedoms is explained. *Lord Greene* has said in the *Wednesbury case* itself that, when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited and interference was not permissible unless one or the other of the following conditions were satisfied: namely, the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered, or the decision was one which no reasonable person could have taken. The Apex Court has concluded in paragraph 71 of **Om Kumar** (supra) as under:

> *"Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary*

proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

6. In view of the above facts and legal propositions, there is no justification for interfering with the order of punishment and no real prejudice appears to have been caused to the petitioners on account of denial of opportunity of being heard at the initial stage of imposition of punishment. More than adequate opportunities of being heard and of stating their case on all available counts are afforded to the petitioners at the subsequent stages. The punishment of dismissal in such cases of gross negligence cannot be termed as one which no reasonable employer would impose. Therefore, this Court would not be justified in entertaining the petitions in its extraordinary jurisdiction under Article 226 of the Constitution. The petitions are accordingly dismissed *in limine.*

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)